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No. 97-498

In The

Supreme Court of the United States

October Term, 1996

ANNE L. ALLEN a/k/a NANCY ALLEN, an incompetent, by WALTER E. ALLEN and ANNE M. ALLEN, her guardians and WALTER E. ALLEN and ANNE M. ALLEN, in their own right,

Petitioners,

vs.

MONTGOMERY HOSPITAL and PAUL R. CASEY, JR., M.D.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENT PAUL R. CASEY, JR., M.D.

WILLIAM H. PUGH, IV
MARY COYNE PUGH
KANE, PUGH, KNOELL
& DRISCOLL, LLP
510 Swede Street
Norristown, PA 19401-4886
(610) 275-2000

DONALD J. MARTIN
Counsel of Record
22 West Airy Street
Norristown, PA 19401-4769
(610) 277-6772

Attorneys for Respondent Paul R. Casey, Jr., M.D.

72243
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

QUESTIONS PRESENTED FOR REVIEW

1. Are persons hospitalized for treatment of mental illness members of a suspect class for equal protection analysis?

2. Is there a fundamental constitutional right to recover damages for all personal injuries caused by simple negligence?

3. Is the right to equal protection of the laws violated because a hospitalized mentally ill person may not recover damages for personal injuries resulting from decisions pertaining to the use of restraints or supervision, absent proof of gross negligence or wilful misconduct?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations iii

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1

Reasons for Denying the Writ 5

I. The Question Stated By Petitioners Is Not Presented By The Facts Of This Case, Nor By The Statute They Challenge. 5

II. This Court Has Stated On Numerous Occasions That Statutes That Deal With The Class Of Mentally Ill Persons Are Analyzed Only Under The Rational Basis Test. 9

III. This Court Has Not Found That There Is Any Right To Sue For Damages When Personal Injuries Are Caused By Negligence, Much Less That The Right Is Fundamental. 11

Conclusion 12

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Allen v. Montgomery Hospital, __ Pa. __, 696 A.2d 1175 (1997) 6, 8

Cardinale v. Louisiana, 394 U.S. 437 (1969) 10

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) 9

Dixon v. Attorney General of Commonwealth of Pennsylvania, 325 F. Supp. 966 (M.D. Pa. 1971) ... 6, 7

Goldy v. Beal, 429 F. Supp. 640 (M.D. Pa. 1976) 7

Heller v. Doe, 509 U.S. 312 (1993) 9

Kranson v. Valley Crest Nursing Home, 755 F.2d 46 (3d Cir. 1985) 11

Rohmer v. Evans, __ U.S. __, 64 U.S.L.W. 4353, 116 S. Ct. 1620 (1996) 10

Youngberg v. Romeo, 457 U.S. 307 (1982) 9

Statutes Cited:

43 Pa. Stat. Ann. § 954(h) 10

Contents

	Page
43 Pa. Stat. Ann. § 954(i)	10
43 Pa. Stat. Ann. § 954(p)	10
43 Pa. Stat. Ann. § 954(p.1)	10
43 Pa. Stat. Ann. § 955(a) through (g)	10
50 Pa. Stat. Ann. § 4101 *et seq.*	6
50 Pa. Stat. Ann. § 7101 *et seq.*	7
50 Pa. Stat. Ann. § 7102	7
50 Pa. Stat. Ann. § 7103	1, 5
50 Pa. Stat. Ann. § 7104	7
50 Pa. Stat. Ann. § 7106	7
50 Pa. Stat. Ann. § 7107	7
50 Pa. Stat. Ann. § 7108	7
50 Pa. Stat. Ann. § 7111	7
50 Pa. Stat. Ann. § 7114	7
50 Pa. Stat. Ann. § 7114(a)	5, 6
50 Pa. Stat. Ann. § 7201 *et seq.*	7
50 Pa. Stat. Ann. § 7301(a)	8

Contents

Page

United States Constitution Cited:

Fourteenth Amendment 5

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions quoted in the Petition for Writ of Certiorari, the following statutory provision is relevant to this action:

50 Pa. Stat. Ann. § 7103

Scope of act

> This act establishes rights and procedures for all involuntary treatment of mentally ill persons, whether inpatient or outpatient, and for all voluntary inpatient treatment of mentally ill persons. "Inpatient treatment" shall include all treatment that requires full or part-time residence in a facility. For the purpose of this act, a "facility" means any mental health establishment, hospital, clinic, institution, center, day care center, base service unit, community mental health center, or part thereof, that provides for the diagnosis, treatment, care or rehabilitation of mentally ill persons, whether as outpatient or inpatients.

STATEMENT OF THE CASE

Petitioner, Anne L. Allen, also known as Nancy Allen, was transferred to Montgomery Hospital on November 30, 1982, from Norristown State Hospital, an in-patient mental health facility. On December 5, 1982, she was somehow able to slip her arms out of a Posey restraint. Ms. Allen was found by a nurse, out of the bed, with her legs from the knees down on the

floor, but otherwise suspended approximately six (6) inches above the floor. (R. 155a-167a[1]). It was alleged that she suffered permanent brain damage as a result. (R. 20a).

Ms. Allen was a patient at Norristown State Hospital, located in Montgomery County Pennsylvania, outside of Philadelphia. She was suffering from mental retardation and psychosis. (R. 194a, 212a, 391a). Prior to her admission to Montgomery Hospital she had been placed in a locked room at Norristown State, in which she fell down and injured herself. (R. 335a-336a). She was transferred to Montgomery Hospital by ambulance, on a stretcher. (R. 190a, 198a).

At the time of her arrival Ms. Allen was screaming and suffering with a fever and dehydration. She had a very large bruise on her right hip. (R. 133a, 182a, 201a). She was unable to communicate (R. 199a, 391a), but was accompanied by records from the State Hospital. Those documents showed that Ms. Allen was first admitted to Norristown State Hospital on October 10, 1969. At the time of her transfer to Montgomery Hospital she was suffering from dehydration, the inability to swallow, muscular rigidity, loss of balance, elevated heart beat and blood pressure, and an electrolyte imbalance. (R. 191a-192a). Her history showed that she was a profoundly mentally retarded and psychotic patient (R. 194a), who was suffering from agitation, falling on attempting to walk, and sliding out of chairs. Her medications were Benadryl, Lithium, Serentil and Vistaril. (R. 192a-193a).

Montgomery Hospital has a written transfer agreement with Norristown State Hospital to deal with illnesses and injuries suffered by Norristown State's mental patients. Respondent, Paul R. Casey, Jr. is one of the internists listed in that agreement

1. "R." refers to the Reproduced Record filed in the Supreme Court of Pennsylvania.

who provide medical care to the Norristown State patients. (R. 175a-180a).

The symptoms presented by Ms. Allen were typical of those seen by the internists at Montgomery Hospital in patients transferred from Norristown State. One or more Norristown State Hospital patients a week are presented at Montgomery Hospital suffering from fever and dehydration. (R. 306a-307a, 378a-379a).

Dr. Casey attended Ms. Allen at the emergency room upon her admission. (R. 134a, 174a). She was dehydrated, had an elevated fever, was screaming, and her body had bruises indicating trauma. (R. 181a-182a, 372a-373a). Following his examination and review of Ms. Allen's physical and mental history, Dr. Casey ordered a course of treatment to rehydrate her, treat her for a urinary tract infection until infection could be ruled out, and treat her for drug toxicity. (R. 203a, 333a, 372a-375a).

Dr. Casey ordered fluids, antibiotics, and discontinued all the psychotropic medication but the Vistaril. Dr. Casey testified that Ms. Allen's age and symptoms indicated the possibility of a urinary tract infection, and that the major psychotropic medications and the Lithium all could cause dehydration, muscular rigidity, difficulty swallowing, and falling. He decided to continue only the medication he considered safe, Vistaril, which is used to control agitation. (R. 220a-222a, 227a, 373a-377a).

As the result of the withdrawal of the psychotropic medications Lithium and Serentil, Ms. Allen's condition improved. (R. 234a-235a, 352a, 384a, 388a). While her episodes of agitation continued, they became less frequent. (R. 235a, 344a).

Although Dr. Casey did not order the Posey restraint himself, he observed its use on Ms. Allen and approved its continuation (R. 237a, 385a) to protect her from the consequences of the intermittent agitation from which she suffered on admission, and continued to suffer throughout her hospitalization at Montgomery. (R. 192a, 241a, 261a, 320a-322a, 384a-385a). Dr. Casey's concern was with all aspects of Ms. Allen's health, both mental and physical. He did not separate the treatment or the use of the restraint between one condition or the other. (R. 384a-385a, 388a).

Due to her mental condition, Ms. Allen was unable to communicate her problems to Dr. Casey. (R. 199a, 391a). Dr. Casey regarded the use of the Posey restraint as appropriate to prevent Ms. Allen from doing further injury to herself. (R. 379a). Neither Dr. Casey nor his partner saw any need for more than the usual degree of supervision. (R. 233a, 310a). Defendants' experts offered testimony that there was no need for private duty nurses nor for one-on-one supervision. (R. 324a, 351a).

There was evidence offered on behalf of plaintiffs-petitioners that greater restraint than provided by a Posey restraint was required, and that more supervision was indicated. Plaintiffs asserted that the defendants failed to comply with statutes, regulations, and other applicable standards. The jury was charged concerning those standards and requirements. (R. 404a-405a, 414a-418a). The jury found that neither Dr. Casey nor Montgomery Hospital was grossly negligent. (R. 428a).

REASONS FOR DENYING THE WRIT

I.

THE QUESTION STATED BY PETITIONERS IS NOT PRESENTED BY THE FACTS OF THIS CASE, NOR BY THE STATUTE THEY CHALLENGE.

The petitioners assert that § 114(a) of the Pennsylvania Mental Health Procedures Act, 50 Pa. Stat. Ann. § 7114(a), violates the Equal Protection clause of the Fourteenth Amendment. This statute provides:

> In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, *a physician*, a peace officer or any other authorized person *who participates in a decision that a person be examined or treated under this act*, or that a person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, *or that the restraint upon such person be otherwise reduced*, or a county administrator or other authorized person who denies an application for voluntary treatment or for involuntary emergency examination and treatment, shall not be civilly or criminally liable for such decision or for any of its consequences. [emphasis added].

This is part of Pennsylvania's Mental Health Procedures Act of 1976, a comprehensive statute regulating hospitalization and treatment of the mentally ill.

50 Pa. Stat. Ann. § 7103, quoted above, limits the

applicability of the Act to mentally ill persons who are hospitalized, whether voluntarily or involuntarily, and to persons receiving treatment involuntarily without regard to where their treatment takes place. This case, therefore, does not, and cannot, involve the rights of *all* mentally ill persons. Nancy Allen was subject to the immunity provisions of 50 Pa. Stat. Ann. § 7114(a) only because she met the criteria for inpatient mental health treatment, and was in fact hospitalized.

Although the Pennsylvania Supreme Court in this case, *Allen v. Montgomery Hospital*, __ Pa. __, 696 A.2d 1175, 1179 (1997), applied the statute broadly to cover all medical care coincident to mental health care, the facts fall within the narrowest reading of the statute. This case involves a decision about the degree of physical restraint used on Ms. Allen. The basis upon which Dr. Casey's liability was predicated by petitioners was that he should have prescribed greater restraints than were used, and directed more supervision. The parties to this case therefore have no interest in the broadly stated question that the petitioners present concerning all medical treatment given to all mentally ill persons.

Petitioners' equal protection analysis is necessarily faulty because they are dealing with an exaggerated class applied to hypothetical medical malpractice liability. Petitioners also analyze this "immunity" provision of the Pennsylvania Mental Health Procedures Act in a vacuum. The analysis is different when this section is considered in the context of the entire Act.

The statute that preceded the Mental Health Procedures Act of 1976 is the Mental Health and Mental Retardation Act of 1966. 50 Pa. Stat. Ann. § 4101 *et seq.* That statute came under attack in the legislature and the courts by advocates for the mentally ill in the 1970's. In *Dixon v. Attorney General of Commonwealth of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa.

1971), the District Court held that the provisions of that statute pertaining to the continuing commitment of mentally ill persons confined because of criminal charges or convictions violated their rights to due process of law. On July 8, 1976, the same court, in *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976), held that the provisions of the statute providing for the involuntary and indefinite commitment of persons in need of care and treatment because of their mental disability, was vague and overly broad. The *Goldy* decision moved the pending legislative reforms forward rapidly.

On the following day Pennsylvania enacted the Mental Health Procedures Act of 1976, 50 Pa. Stat. Ann. § 7101 *et seq.* Article I of the Act contains general provisions. These include a statement of the purpose of insuring the availability of adequate treatment to persons who are mentally ill. 50 Pa. Stat. Ann. § 7102. Another section, 50 Pa. Stat. Ann. § 7104, *requires* adequate treatment designed and administered to alleviate pain and distress, and to maximize the probability of recovery. "Adequate treatment" is defined in that section to involve a number of services, including medical care.

50 Pa. Stat. Ann. §§ 7106 and 7107 require the formulation of treatment plans, and 50 Pa. Stat. Ann. § 7108 requires an examination of the patient and a review of the plan every thirty (30) days. Records are made confidential, beyond what is mandated by Pennsylvania's physician-patient privilege. 50 Pa. Stat. Ann. § 7111. The "immunity" provision involved in this case, which limits liability to cases of willful misconduct or gross negligence, is contained in 50 Pa. Stat. Ann § 7114.

Article II of the Act, 50 Pa. Stat. Ann. § 7201 *et seq.*, deals with the authorization, review and patient's revocation of his or her consent to voluntary treatment. Article III deals with involuntary examination and treatment. Involuntary treatment,

whether inpatient or outpatient, may be imposed only on persons who are severely mentally disabled and in need of immediate treatment who present a clear and present danger to themselves or others. 50 Pa. Stat. Ann. § 7301(a). The balance of Article III mandates short time limits for involuntary commitment, and provides for continuing periodic review by judicial officers.

The last article, Article IV, applies to persons charged with crimes or serving sentences. It is Pennsylvania's statutory law concerning competence to proceed to trial, and addresses the treatment of persons acquitted for lack of criminal responsibility.

In *Allen v. Montgomery Hospital*, __ Pa. __, 696 A.2d 1175 (1997), the Pennsylvania Supreme Court viewed the "immunity" provision in the context of the entire statute, and found, correctly, that the limitation of a medical practitioner's liability to hospitalized mentally ill patients serves the purposes of insuring adequate treatment, and encourages health care practitioners to provide services to these more difficult to treat patients. In this case the difficulty was compounded by Nancy Allen's inability to communicate her problems to Dr. Casey. (R. 199a-391a). Not all hospitalized mentally ill persons suffer from such a degree of communication difficulty, but by definition the seriously mentally ill have a different perception of reality than the rest of us. This compounds the treatment difficulties recognized by the Supreme Court of Pennsylvania, and justifies the higher burden of proof to recover damages.

II.

THIS COURT HAS STATED ON NUMEROUS OCCASIONS THAT STATUTES THAT DEAL WITH THE CLASS OF MENTALLY ILL PERSONS ARE ANALYZED ONLY UNDER THE RATIONAL BASIS TEST.

In *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985), this Court was concerned with zoning restrictions requiring a special use permit for the operation of a group home for the mentally retarded. The Court analyzed when each of the levels of equal protection review is employed. The Court held that heightened review is inapplicable when a group affected by a law has distinguishing characteristics relevant to the interest the state has authority to implement. This Court declined to apply more than rational basis analysis to "the large and amorphous class of the mentally retarded". 473 U.S. at 445. The Court compared them to other similar groups including the mentally ill. 473 U.S. at 445-446.

In *Heller v. Doe*, 509 U.S. 312 (1993), this Court also addressed a challenge to the use of differing statutory standards for the commitment of the mentally retarded and for the mentally ill. The Court noted that it has applied rational basis review in previous cases involving both the mentally retarded and the mentally ill. 509 U.S. at 321.

Youngberg v. Romeo, 457 U.S. 307 (1982), involved the rights of committed mentally retarded individuals to safe conditions of confinement, to freedom from bodily restraints, and to training and habilitation. While the Court found that the mentally retarded (and, we assume, the mentally ill) have the right to freedom from improper bodily restraints, the test of validity is only to make certain that professional judgment was in fact exercised. 457 U.S. at 319-322, 324. The jury in this

case applied much greater scrutiny. It assessed the professional judgment of Dr. Casey and found that it did not fall to the level of gross negligence.

Petitioners suggest that *Rohmer v. Evans*, __ U.S. __, 64 U.S.L.W. 4353, 116 S. Ct. 1620 (1996), somehow changes this result. We begin with the observation that *Rohmer* was decided on May 20, 1996, and petitioners' brief was filed in the Supreme Court of Pennsylvania by September 5, 1996, thus depriving the Supreme Court of Pennsylvania the opportunity to consider this aspect of the constitutional challenge. *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

Rohmer applied a rational basis analysis to a Colorado constitutional amendment that infringed the fundamental rights of gays and lesbians to participate in the political process, and to obtain statutory protection beyond that afforded by the Constitution. This Court found that the amendment had no rational basis, and appeared to be motivated only by animus.

The statute in this case is nothing like that. It is part of a comprehensive act dealing with the treatment of hospitalized mentally ill persons. It defines and requires adequate treatment. It limits strictly the grounds for involuntary treatment, and the time for which involuntary treatment may last. The mentally ill have not been excluded from the political process in Pennsylvania. They are protected not only by the Mental Health Procedures Act, but by Pennsylvania's Human Relations Act. That statute includes mental impairment in the definition of handicaps and disabilities. 43 Pa. Stat. Ann. § 954(p) and (p.1). 43 Pa. Stat. Ann. § 955(a) through (g) prohibit discrimination on the basis of non-job related handicaps or disabilities in all aspects of employment. 43 Pa. Stat. Ann. § 955(h) and (i) prohibit housing discrimination on the basis of any handicap or disability.

III.

THIS COURT HAS NOT FOUND THAT THERE IS ANY RIGHT TO SUE FOR DAMAGES WHEN PERSONAL INJURIES ARE CAUSED BY NEGLIGENCE, MUCH LESS THAT THE RIGHT IS FUNDAMENTAL.

Petitioner speaks of a fundamental right to sue for damages, but cites no decision of this Court that establishes such a right. There is none. *See Kranson v. Valley Crest Nursing Home*, 755 F.2d 46 (3d Cir. 1985). There, a Pennsylvania statute that granted local governments immunity from medical malpractice claims, while allowing the state to be sued for similar acts of malpractice, was found to violate no federal constitutional provision.

Petitioners cite no case from any Court holding that such a fundamental right exists. To find such a right would call into question workers' compensation laws, no-fault automobile insurance laws, and efforts on both the state and federal level to reform the medical malpractice system. The creation and abolition of causes of action in tort are matters of state law. *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46, 52 (3d Cir. 1985).

The statute in question does not impinge on any fundamental right.

CONCLUSION

The question raised in the Petition for Writ of Certiorari is not presented by the facts of this case, nor by the statute at issue. No suspect classification is implicated. No fundamental right is involved. While this case is important to the parties, it does not merit the time of this Court.

Respectfully submitted,

DONALD J. MARTIN
Counsel of Record
22 West Airy Street
Norristown, PA 19401-4769
(610) 277-6772

WILLIAM H. PUGH, IV
MARY COYNE PUGH
KANE, PUGH, KNOELL
& DRISCOLL, LLP
510 Swede Street
Norristown, PA 19401-4886
(610) 275-2000

Attorneys for Respondent
Paul R. Casey, Jr., M.D.